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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1217

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Petitioner,

v.

UNITED FRUIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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* The Appendix consisting of four printed volumes and references thereto are as follows: "I-. . . . ; III-. . . . ; and IV-. . . . ".

References to Appendix A through F at the end of this petition are as follows: "App. . . ."

Plaintiff-Petitioner, International Railways of Central America, is sometimes referred to as "IRCA".

Defendant-Respondent, United Fruit Company, is sometimes referred to as "United" or "UF".

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

International Railways of Central America, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on January 27, 1967. Petitioner was plaintiff and respondent was defendant below.

Opinions Below

The opinion of the Court of Appeals has not yet been reported. A copy is appended to this petition as Appendix A. The opinion of the District Court is reported in 254 F. Supp. 233; it is also printed in petitioner's Appendix I (5a-21a).

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Statutes and Rule

The pertinent statutes are Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. §§ 1 and 2), Section 73 of the Wilson Tariff Act (28 Stat. 570, 15 U.S.C. § 8), and Sections 4, 4B and 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. §§ 15, 15B, and 18 [1946 ed.] prior to its amendment in 1950); said statutes are reproduced in Appendix C. The pertinent rule, Rule 9(g) of the General Rules of the U. S. District Courts, for the Southern District of New York, is reproduced as Appendix D.

Questions Presented

1. In a treble damage action for violation of the antitrust laws, was it proper for the Court of Appeals to grant summary judgment for the defendant by *refusing to toll* the statute of limitations on the ground that plaintiff failed to show that a demand on the plaintiff to sue defendant for antitrust violations "would necessarily have been fruitless," where

   (i) defendant conceded not only that it dominated a majority of plaintiff's directors during the material period but also that demand on the plaintiff to sue defendant would have been a useless and futile act,

   (ii) the undisputed record evidence is to the same effect,

   (iii) such domination and futility of demand were found as facts in a prior state court litigation,

   (iv) the U. S. Court of Appeals itself held that "the odds may have been against the likelihood that [plaintiff's] board of directors would have authorized an antitrust action against [defendant]" and

(v) the present action was brought *less than four years* (§ 4B of the Clayton Act, 15 USC § 15b) after defendant's wrongful control and domination over plaintiff ceased,

in view of the applicable decisions of this court that the statute of limitations *is tolled* where plaintiff "has been prevented from asserting" its claims, *Burnett* v. *N. Y. Cent. R. Co.*, 380 U. S. 424, 429, and that "the maxim that no man may take advantage of his own wrong" bars "inequitable reliance" on federal statutes of limitations, *Glus* v. *Bklyn. East. Dist. Term.*, 359 U. S. 231, 232-3?

2. In an antitrust case, was it proper to grant *defendant's motion for summary judgment* dismissing plaintiff's damage claims of $435,000,000 where the issue was entirely one of law on conceded facts, the Court of Appeals improperly going behind the facts conceded by the defendant and making a fact determination contrary to such concession and contrary to the undisputed record evidence, the court also drawing inferences, making assumptions and arguing possibilities *in favor of defendant, the moving party,* all contrary to the decision of this court in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 473, requiring the court to "look at the record on summary judgment in the *light most favorable to* [*plaintiff*], *the party opposing the motion*"?

3. Where defendant shipper, seizing control of plaintiff railroad over which import and export traffic must flow, imposes losses on plaintiff railroad through prohibitive railroad rate and service discriminations against defendant shipper's competition and excludes said competition, and these facts are indisputably established by documents—as well as by collateral estoppel—is not plaintiff railroad entitled to summary judgment under *White Motor Co.* v. *U. S.*, 372 U. S. 253?

Statement

A. Nature of Present Action.

The District Court* found: "There can be no doubt that United controlled IRCA at least through 1961" (254 F. Supp., at 239).

On February 16, 1965, IRCA, no longer under United's domination, commenced this action against United for treble damages for violation of the antitrust laws (15 USC § 15), set forth in First, Second, Third, Fourth and Sixth Claims of the complaint (as amended before answer). United monopolized and conspired to restrain trade in the import of bananas to the United States from Guatemala and in the carriage of commodities between the two countries. Since IRCA was the only railroad of any consequence in Guatemala, United's control and domination over it, since at least 1928, were an important means by which it effected the unlawful monopolization and restraint. United used that monopolization and restraint to the injury of IRCA in its business and property. The different transactions in which IRCA was thus victimized by United's antitrust violations are set forth in separate Claims, briefly summarized as follows:

FIRST: Seeks damages of $75,000,000 because United prevented IRCA, during the period 1928-1961, from obtaining banana traffic from United's competitors.

Second: Seeks damages of $55,000,000 less the principal paid on the *Ripley* state court judgment** because United, 1928-1961, paid IRCA monopolistically low

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* The U. S. District Court's jurisdiction is based on the provisions of Title 15 U.S.C. §§ 15, 26 and 22 and Title 28 U.S.C. §§ 1337 and 1391(c); jurisdiction over the five claims here involved is based on the exclusive jurisdiction of the U. S. district courts over federal antitrust claims.

** *Ripley, et al.* v. *IRCA and United Fruit Co.*, 8 N. Y. 2d 430, 9 N. Y. 2d 758 (rearg. den. 2/23/61, see *infra*, p. 5).

rates on its own bananas and other shipments via IRCA.

Third: Seeks damages of $24,000,000 because United, since 1949, has restricted its own banana shipments over IRCA, and during the period 1961-1964 disposed of its banana plantations in the Tiquisate area of Guatemala to others for cotton planting and other purposes, refusing to permit their acquisition for continuation of production of bananas for export to the United States.

Fourth: Seeks damages of $15,000,000 because United, 1928-1961, prevented IRCA from realizing increased revenue that it would have obtained had other common carriers by water, with rates lower than those charged by United ships, not been excluded by United's unlawful monopolization and restraint, from the United States-Guatemala trade in coffee and other commodities shipped by third parties.

Sixth: Seeks damages for the injury to IRCA's business and property from United's acquisition, unlawful under § 7 of the Clayton Act (15 USC § 18), of IRCA's stock, as the effect thereof might be (and was) substantially to lessen competition or to tend to (and did) create a monopoly (damages are equal to aggregate claimed in first four claims).*

Total damages claimed amount to $169,000,000, and when tripled, to $507,000,000.

B. Prior State Court Judgment, in Derivative Stockholders' Action, That United Breached Fiduciary Obligation Owed Toward IRCA, in Paying Inequitably Low Rates on Its Shipments Over IRCA's Railroad.

In a derivative action brought by minority stockholders of IRCA, in its behalf, against United, the New York State

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* The Fifth Claim, predicated on the facts set forth in the Third Claim, for breach by United of a written contract to ship over IRCA, is not here involved.

Court of Appeals, *Ripley, et al.* v. *IRCA and United Fruit Co.*, 8 N. Y. 2d 430, 9 N. Y. 2d 758 (rearg. den. 2/23/61), affirmed a judgment of the Appellate Division, 8 A. D. 2d 310 (hereafter termed *Ripley*), whereunder IRCA received cash damages from United in excess of $9,000,000 (principal and interest), based on insufficient freight rates charged United by IRCA on United's shipments of bananas and imported supplies over IRCA. Said judgment also fixed rates for the future. The court found that United controlled and dominated IRCA at least from 1928 and stood in a fiduciary relationship to IRCA, and that the inadequate rates paid by United were a breach of its fiduciary duty.*

With respect to *Ripley's* specific findings, the present amended complaint alleged that "[d]efendant is estopped from challenging any of the specific material facts found in the State Court action. *Lyons* v. *Westinghouse*, 222 F. 2d 184 (CA 2)" (II-6, ¶ 11). (Certain *Ripley* findings are in Vol. III of the Appendix).

C. IRCA's Pleaded Disability to Sue United, by Virtue of Adverse Management Control, as Tolling Four-Year Federal Statute of Limitations on Antitrust Claims.

The amended complaint alleged that: "United had management control over IRCA since at least 1928 continuously to January 1962 and by virtue thereof IRCA acted, during that period, in the interests of United rather than for all its stockholders. Said control and domination be-

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* The Appellate Division held (8 A. D. 2d, at 317):

"While there was an attempt to give a verisimilitude of complete independence and separation between the companies, the realities presented a case of *complete domination.*" (Italics supplied)

In affirming, the Court of Appeals held (8 N. Y. 2d, at 436):

"We are satisfied that the findings are sustained, that United was in practical control of IRCA at least after the creation of the voting trust in 1928, and stood in a fiduciary relationship to IRCA. . . ."

tween 1928 and 1961 was the instrument by which . . . United prevented IRCA from bringing suit against it for relief therefrom under the anti-trust laws, thereby tolling the Statute of Limitations" (II-10, ¶ 24).

D. Commerce Involved.

The important trade and commerce involved is that between Guatemala and the United States, principally banana imports from Guatemala. Details are set forth in the Amended Complaint, paragraphs 5, 6, 7, 8, 9 and 10 (II-4-6).

E. United's Monopolization of This Commerce.

United at all material times imported most or all of the bananas from Guatemala to the United States and is also the dominant importer of bananas from all other sources (I-188a-189a). United is also the dominant common carrier by water of the other traffic between the two countries (III-200a-201a). United acquired its dominant position by a series of mergers, acquisitions, and restrictive, exclusionary, and other predatory practices detailed in the Appendix, Volume I at 190a-214a. Unquestionably United has exercised effective power to control prices of bananas in this country; also to exclude Guatemalan and other competitors from the banana import trade and from the water carriage of other traffic between the two countries (I-214a-219a; III-200a-201a).

F. Plaintiff's Railroad a Prime Instrument and Victim of This Monopolization.

Plaintiff's Guatemalan railroad was the bottleneck through which most of this traffic had to flow between Guatemala and the United States (II-2, par. 3(a); I-251a, par. 2). Accordingly, it became a prime instrument by which defendant United acquired and maintained its monopolization of that trade. Plaintiff also, thereby, became the prime victim of that monopolization.

The material facts were conclusively established in *Ripley, supra,* and are indisputably established by the documents in the record here. Moreover, by failing to contest plaintiff's statement under Rule 9(g) in the District Court that "there is no genuine issue to be tried" as to control and domination through 1961 and the antitrust claims on which plaintiff seeks summary judgment (I-180a-183a), United is deemed to have admitted all material facts (App. 31a).

G. United's Acquisition of Management Control Over IRCA and Its Monopolistic Purpose.

The Court of Appeals stated: "From its incorporation in 1904, IRCA's fortunes were closely linked to [United's] banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's [United] became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala" (App. 3a).

In 1928, United learned of the intention of certain bankers to take stock control of IRCA and took prompt steps to secure control for itself. United, with banker collaboration, purchased the control block of IRCA's dominant shareholder, Minor C. Keith, and placed the same in a 10-year voting trust which was operated out of the law office of Bradley W. Palmer, a director, member of the executive committee and counsel to United.* United took actual control of the operations and operating management of IRCA (III-13a-20a; 37a-41a).

In 1936, United acquired from IRCA 185,000 shares of common stock of IRCA, giving it 256,000 common shares or 42.68% of the voting stock (500,000 shares of common and 100,000 of preferred) and cementing control. The stock ownership thus became insurance against changes in

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*That acquisition made UF, with 71,000 shares of common stock, the largest single shareholder (App. 3a).

directors and also guaranteed a continuance of management satisfactory to United. United's dominant control over IRCA had not been disclosed to the public stockholders of IRCA (III-21a-41a).

The Referee* in *Ripley* expressly found that the purpose of United's stock acquisition and resulting control over IRCA was to gain monopolistic control over competitors (banana growers, middlemen, shippers and steamship companies) and over its own payments to IRCA (Report and Decision, pp. 183-4) (Also see III-21a-26a; 201a; 212a):

> "Summarizing the foregoing it appears so clear as to be practically conclusive that as the U.F.Co. Agricola [CAG]** banana business in the western area grew and its prospective potentialities in the foreseeable future were realized by U.F.Co. *the idea was adopted of taking over control of IRCA and using its transportation by rail to and the wharf and port facilities at Barrios for shipping its bananas, exclusively, and in any event practically free, of competitive shipping,* the vessels of U.F.Co. also having the beneficial use, *beyond any possible 'competitors'* of the IRCA Barrios pier. The many other unusual benefits of U.F.Co. in the contracts with IRCA, *the discouragement or exclusion of competitive growers, middle men, and shippers,* indicate three main inferences which are required to be drawn from the facts shown by the evidence. They are:
>
> * * * * * *
>
> *"The obtaining of very low rates for U.F.Co. and very high rates for any possible competitor stifled competition."* (Italics supplied)

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* To hear and determine; his findings and conclusions were affirmed on the appeals.

** CAG—Compania Agricola de Guatemala, United's wholly-owned instrumentality for production of bananas on the western side of Guatemala.

Indisputably, those were the threatened and realized effects of such stock acquisitions, thereby unduly threatening and restraining the import trade of the United States. The U. S. Court of Appeals recognized United's monopolistic purpose (App. 4a-5a):

> "As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder."

After United's motion for reargument was denied in *Ripley* on February 23, 1961 (9 N. Y. 2d 758) which was within four years of the date this action was commenced, final judgment was entered in *Ripley* on March 1, 1961 (I-176a) and in January, 1962, United disposed of its controlling stock interest in IRCA.*

H. United's Suppression of and Discrimination Against Independents' Banana Traffic Over IRCA, 1928-1962.

United's suppression of independents' banana traffic over IRCA is detailed in the *Ripley* findings of fact (III-56a-91a).

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* Required to divest itself of all of IRCA stock by June 30, 1966 under final judgment in *United States* v. *United Fruit Co.* (I-82a-83a).

United sought and utilized its control and domination over IRCA to suppress competition in the banana business in Guatemala (III-56a, B305). There was no substantial actual competition to United in the Guatemalan banana business for over forty years after the founding of IRCA (III-57a, B307). The suppression of and discrimination against the independent banana traffic were embodied in contracts between United and IRCA (III-57a-60a), and exercised through supervision of IRCA rates to independents (III-61a-73a). They were manifested in United-inspired refusals by IRCA to do business with independents (III-73a-74a; 62a-67a), by prohibitive and discriminatory rates (III-61a-73a), by withholding special facilities and services afforded United (III-76a-90a), and by information to United from IRCA on the independents' moves (III-75a).

Prior to 1939, United arranged with IRCA to ignore requests for the quotation of rates on export bananas and at last resort, to quote sums approximating $630 per car (III-62a-73a). In 1939, IRCA instituted a public tariff of $130 per car plus about $72 for wharfage and loading aboard ship. United in this period paid $60 per car. Later, during the *Ripley* litigation, United raised the rate to about $85 per car. Furthermore, the CAG rate, lower than the independent banana rate, was not warranted by differences in cost to IRCA (III-141a, D106).

United arranged to have IRCA remove its own ownership labels from IRCA's banana cars and to substitute the name of CAG, thereby giving the false appearance of United ownership and consequent unavailability to independents. IRCA *refused* to furnish independents with special banana cars and extra train service (III-79a-82a) and permission to install loading conveyors on the IRCA pier (III-88a-90a); although all of these services were required for an efficient banana operation and were furnished to United and CAG.

In order to avert drastic Guatemalan government intervention, IRCA, in 1946, adopted a quota system in the allocation of its own banana cars and locomotives, which provided first for the complete filling of all the transportation requirements of United and CAG and then the division of the remaining balance of available equipment, if any, among the independents. Because of United's requirements, IRCA frequently did not furnish cars to independents or did not deliver all they ordered (III-84a-88a).

These sharp restraints had the obvious effect on independent banana traffic. (The statistics are set forth at II-18.) No substantial independent banana traffic ever moved over IRCA from eastern Guatemala. There were no shipments of independent bananas from western Guatemala over IRCA prior to January 1945, and such movement as then occurred was substantially less than it would have been in the absence of United's monopolization through acquisition of IRCA stock and management control over it.

I. United's Depressing of the Rates Paid to IRCA on Its Own (Including Its Wholly-Owned Subsidiary CAG's) Shipments.

United used its control and monopolistic power over IRCA to depress the rates paid to IRCA on its own (including CAG's) shipments.

In *Ripley*, the court found that since 1943 the fair market rate on export banana shipments from western Guatemala over IRCA was higher than the $130 line haul rate charged to independents (III-187a; also see III-126a-186a). On shipments from eastern Guatemala, the fair market rate was higher than that charged United (III-187a-192a). On imports, the public tariff, about $350 per car (III-195a), was found to be the fair rate, while United paid $60, and later $100, for a comparable haul (III-196a).

Ripley judgment in fixing fair rates payable by fiduciary to cestui, did not correct for monopolistic discount enjoyed by United.

The *Ripley* judgment escalated the rates payable by United to IRCA on CAG banana shipments to $75 per carload effective January 1, 1946, increasing progressively $5.00 per year commencing in 1948 to reach $130 per carload after January 1, 1958, but nothing for wharfage and loading (Judgment, decretal parag. 8(c), (d), I-171a-172a). During this period the public tariff on such shipments was $130 per carload plus about $72 for wharfage and loading and the fair market rate higher (III-187a, D478).

The *Ripley* judgment escalated the rates payable by United to IRCA on CAG imports by 10 percent per year (Judgment, decretal parag. 8(e), I-172a-173a). These small increments would take a long time to raise the CAG rate from $100 to the public rate of $350. No increases were provided for CAG's diesel imports or for wharfage on United-CAG imports (Judgment, decretal parag. 11(a), I-174a).

What accounts for the discrepancy between the public, fair market rates, as found by the courts in *Ripley*, and the rates they decreed payable by United? The New York Court of Appeals, in refusing to review, on the stockholders' appeal, the Appellate Division's determination of the amount of unjust enrichment, because made on the "facts" (8 N. Y. 2d, at 446-7), expressly held that the failure to make correction was sound because the State court had no power to consider monopolization:

> "The point in the case insofar as the New York courts are concerned is not so much whether Irca has fostered a monopoly in United in the Guatemalan banana business, as whether it has been adequately paid for what it has done for United." (*Id.* at 446)

J. United's Monopolization of Water Carriage of Coffee From, and Commodities to, Barrios, Shipped by Third Parties.

United has used its control over IRCA since at least 1928, to divert traffic to Barrios and there to United steamers for the ocean voyage between the United States and Guatemala (III-201a, 202a, 212a, 204a-213a, 134a).

The combined rail-water rate on traffic moving through Barrios, Guatemala, to southern and eastern ports of the United States was competitive with the combined rail-water rate on traffic moving out of the Pacific side of Guatemala to those ports. United dictated the division of the combined rail-water rate through Barrios between it and IRCA. United's steamship competition was ready to carry coffee from Barrios at 22 cents per 100 lbs. compared with United's much higher rate of at least 37 cents (III-199a-200a, F12); this higher rate, reflected in the division with IRCA, deprived IRCA of at least 15 cents per 100 lbs.

The Decisions Below

The District Court had granted defendant's motion for summary judgment on the ground of *res judicata* (I-11a-16a) but the Court of Appeals reversed this determination (App. 18a-22a) and it is not involved in this petition.

The District Court also granted defendant's motion for summary judgment on the ground the statute of limitations was not tolled because a derivative action in behalf of the corporation *might* have been brought by a public stockholder or minority director (I-17a-21a). This ground the Court of Appeals purported not to pass on (App. 16a).

Nevertheless, although the action was brought within four years after United surrendered its domination over IRCA, the Court of Appeals rejected tolling of the statute of limitations (App. 18a) and granted summary judgment

dismissing the complaint as to all violations occurring before February 16, 1961. The basis for the decision below was that plaintiff could not show that a demand by a public stockholder or minority director, after May 1959, on the plaintiff's dominated majority directors to sue defendant "would necessarily have been fruitless" (App. 15a). This despite United's concession that demand was a useless and futile act (App. 32a) and the Court of Appeals' candid recognition that "the odds may have been against the likelihood that [plaintiff's] board of directors would have authorized an antitrust action against [defendant]" in that period (App. 14a).

The District Court, affirmed by the Court of Appeals, denied plaintiff's motion for summary judgment on the issue of liability on all antitrust claims of the amended complaint (except the Third) and of partial damages on the Second and Sixth Claims, principally on the ground that it granted defendant's motion for summary judgment (I-11a; App. 23a).

Reasons for Granting the Writ

1. Tolling a federal statute of limitations because the wrongdoer, by adverse domination, has prevented the corporate victim from asserting its rights is a novel question of general importance which this Court should decide.

2. The decision below denying tolling immunized flagrant violations of the antitrust laws over a 30-year period (not remedied by the consent decree or the *Ripley* state court judgment) even though plaintiff did not sleep on its rights but was disabled from instituting suit by the defendant's domination. Ironically, that very domination was also the instrument by which defendant monopolized an important segment of the import and export trade of the United States. The decision below thus presents, also, a

question important to the public policy of the United States against monopolies.

3. Moreover, the decision below should be reviewed because it conflicts with basic principles laid down by this Court.

A. The Court of Appeals, going off on a tack not suggested in the District Court nor raised by United in either court, first held that the material issue on tolling was, whether "a demand" by a public stockholder or a minority director on the plaintiff's board of directors to sue "would necessarily have been fruitless" (App. 15a). It then granted summary judgment by finding against plaintiff on that newly created issue, even though (1) defendant had not only conceded its domination over six of the nine directors of plaintiff during the material period but had also conceded that demand on plaintiff to sue would have been futile, (2) the record evidence is uncontested to the same effect, (3) such domination and futility were found as facts in *Ripley*, and (4) the Court of Appeals itself considered it unlikely that such demand would have induced the board to authorize suit. Clearly, the Court of Appeals drew inferences, made assumptions and argued possibilities in favor of defendant, *the moving party* on the limitations issue, all contrary to *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473, which requires the court to "look at the record on summary judgment in the light most favorable to [plaintiff], *the party opposing the motion.*"

B. Adverse domination, at least such as makes it unlikely that the dominated majority of the victim's board of directors would prosecute an action vigorously and in good faith against the dominating wrongdoer, is sufficient to invoke *Burnett* v. *N. Y. Cent. R. Co.*, 380 U. S. 424, 429, that the statute of limitations is tolled where the plaintiff was "prevented" from bringing suit. It is also sufficient to make applicable *Glus* v. *Bklyn. East. Dist. Term.*, 359 U. S.

231, 232-3, that the statute of limitations is tolled where otherwise a defendant would have the advantage of his own wrong. The decision below clashes with those cases and the principles on which they were decided.

C. In *Minn. Mining & Mfg. Co.* v. *N. J. Wood Finishing Co.*, 381 U. S. 311, 318, this Court ruled in favor of tolling the antitrust limitations statute to give "considerable impetus" to the "policy" of Congress, that "private antitrust litigation [be] one of the surest weapons for effective enforcement of the antitrust laws." The decision below denying tolling ignores that strong public policy.

D. In *White Motor Co.* v. *U. S.*, 372 U. S. 253, 259-60, this Court held that an indisputably established *per se* violation of the antitrust laws should be condemned by summary judgment. The decision below defies that ruling.

Discussion of Errors of Court of Appeals

a. The Court of Appeals, in summarily rejecting tolling because plaintiff had not "rule[d] out the possibility of a corporate suit against [defendant] on the demand" of a public stockholder or minority director of plaintiff between May 1959 and February 1961 (App. 18a), unfairly mousetrapped the plaintiff. United *conceded* that from May 1959 to February 1961, United dominated six out of the nine IRCA directors. United's position in the District Court and Court of Appeals (App. 8a) was simply that as a matter of law "the presence of one or more independent minority directors is sufficient to stop the tolling of the statute . . . and that from at least 1959 onwards there were not one but three indepedent directors of the Railway . . . ."*

*Defendant's Reply Brief On Its Motion for Partial Summary Judgment (Rule 56) p. 29, dated June 23, 1965, filed in the District Court (App. 33a).

In the Court of Appeals, United's position was:*

> "We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the degree of 'domination' found in *Ripley* may have been sufficient to *prevent Railways from bringing an action in its own name,* as the Appellate Division pointed out in the quotation at appellant's br. 45-6 ['It is equally obvious here that demand upon the directors of IRCA to sue UFCo, in connection with the acts and transactions complained of . . . would have been a *useless and futile act.* . . . No fair and honest consideration of such a demand could have been anticipated under the circumstances; nor could there be any reasonable expectation of any just and vigorous prosecution of a suit. *The IRCA board was under the influence of UFCo with respect to the causes of action which could be asserted against UFCo . . .* * * * *Surely,* we would not compel them to entrust the prosecution of such an action in the hands of persons who would be opposed to the success of the suit']." (Italics supplied)

Instead of viewing the record in the light "most favorable to [IRCA], the party opposing the motion", *Poller, supra,* the Court of Appeals ignored both United's concessions and the record evidence against it.

The three minority directors elected in May 1959 (Cunningham, Yaeger and Ruckle) became IRCA directors in the belief that the majority of the directors (six) were dominated by United (I-130a); that McGovern (Chairman of the IRCA Board) "was definitely a fruit company em-

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* Brief of Defendant-Appellee, p. 56, dated October 24, 1966, filed in the Court of Appeals (App. 32a).

ployee" (I-135a); that everything "was cut and dried between Mr. McGovern, Tennyson and several of the other directors" (I-135a); that the board "was very definitely under the domination of the United Fruit Company" (I-135a); and that "Haase [President] was a dominated director" (I-135a).

The six directors dominated by United between May 1959 and February 1961 were McGovern, Tennyson, Partridge, Willer, Haase, and McGregor. The first four named were directors since at least 1949. As to them, the Appellate Division in *Ripley* held (8 A. D. 2d at 317): "the realities presented a case of *complete domination.*" (Italics supplied.) Haase was tagged as a "dominated director" (I-135a) which is undisputed in the record and McGregor was elected in 1958 (I-127a) as United's nominee.* This accounts for the six directors dominated by United from May 1959 through February 1961. The Court's holding as to the six directors was contrary to United's concession and the undisputed evidence.

United, in its answer (par. 15), admitted that "United's stock constituted the majority of all shares actually voted at IRCA's annual meetings for the election of directors from 1938 through 1960" (I-253a), the last term expiring in May of 1961.

Despite the record evidence and United's concessions, on the critical issue of whether a majority of IRCA directors would have voted to sue United for antitrust claims between May 1959 and February 1961, the Court of Appeals, contrary to *Poller, supra;* drew inferences, made assump-

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* "In 1958, after the first appeal in *Ripley* was filed, United advised IRCA that it was not going to vote its IRCA stock at the coming stockholders meeting. However, at the meeting itself, when it appeared that an independent board of directors might be elected, United reversed itself and voted its common stock and elected its own nominees" (I-122a).

tions and argued possibilities in favor of United, the moving party.*

The degree of erroneous argument in favor of United is epitomized by the court's discussion (fn. 9, 15a) of a hypothetical stockholders meeting after the trial court's decision in *Ripley*. It gratuitously assumes a meeting at which *5%* of the outstanding shares fail to vote (a major fallacious premise in light of the actual fact that nearly *15%* of the outstanding stock failed to vote during the 1952 proxy fight). The court then builds on this false premise and states that "UF would have had to retain the suffrage of 29,000 of the independent shares to prevail." However, if *15%* did not vote at this hypothetical meeting as in 1952, then UF could even lose all 51,000 shares of public shares it received in 1952 and still prevail with its own block of IRCA stock (256,000 shares).

The court below stressed the fact that after the trial court in *Ripley*, over IRCA's strong opposition, made its decision requiring United to pay money to IRCA, for breach of fiduciary obligation, IRCA's general counsel stated in the appellate courts that they supported the stockholders' appeal for a larger judgment (App. 15a). The Appellate Division emphasized United's complete domination over IRCA and its disability to sue United, in

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* E.g. (i) one cannot "assume that the other directors would have been obdurate" (App. 14a); (ii) after *Ripley's* "affirmance by the New York Courts" (App. 14a) (United's motion for reargument was denied by the Court of Appeals of the State of New York on February 23, 1961, 9 N. Y. 2d 758, within the statute of limitations here); (iii) "the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request" (App. 14a) (said counsel for IRCA had been counsel for the thirty years of United's domination; *Ripley* found that "IRCA did not have independent counsel" and that the fees for its attorneys "were submitted to United for approval in advance of their payment by IRCA" (III-33a)).

face of the fact that IRCA's attorney, after the Referee rendered his decision against United, reversed position and told the Appellate Division that he now favored judgment against United. And the Appellate Division, affirmed by the Court of Appeals, rendered a judgment predicated on continuing adverse domination, applicable also to the period after that switch in position by IRCA's counsel and continuing past 1959 and into 1961. And the U. S. District Court found expressly that "there can be no doubt that United controlled IRCA at least through 1961" (I-17a). Disabled to bring the *Ripley* action, IRCA could not realistically bring an antitrust claim against United for half a billion dollars, while United's General Attorney, James McGovern, was Chairman of IRCA's board.

The findings in *Ripley* are conclusive on the adverse management control, requisite for tolling. *Ripley* expressly found that United exercised "complete domination" over IRCA (8 A. D. 2d, at 317); that United thus had "a divided loyalty" (*id.*); that the "existing relationship precluded any possibility of genuine arm's length bargaining between" them (*id.*); and that United abused the resulting "fiduciary relationship" (8 N. Y. 2d at 436) by enriching itself unjustly at IRCA's expense to the tune of millions of dollars (*id.*, at 446). This is "adverse domination" to the hilt, ample to toll the statute of limitations.

The Court of Appeals sensed the infirmity in its grant of summary judgment when it stated that the issue, which it made critical to tolling, of whether "demand . . . would necessarily have been fruitless" (App. 15a) is "one on which plaintiff might have been entitled to take evidence" (App. 15a fn. 10). The court's reasons (in same fn.) for not allowing plaintiff to go to trial on that issue are then given as follows: Plaintiff "raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not ad-

verted to any further evidence that might be introduced on this point". Naturally, plaintiff raised no objection nor requested an opportunity to offer evidence on a point United had conceded and upon which the record evidence was undisputed in favor of plaintiff! That attempted justification offered by the Court of Appeals for entering summary judgment dismissing over $435,000,000 of federal antitrust claims is akin to a "catch-penny contrivance to dispose of cases merely for the sake of disposition and . . . [clearing up] dockets . . ." 1B Moore, Federal Practice Par. 0.412(1) at 1810 (2nd ed. 1965) instead of carrying out the Congressional mandate for enforcing the antitrust laws and correctly applying the principles applicable to summary judgment.

If the Court views the record in the light most favorable to IRCA, the party opposing the motion, then *no* summary judgment should have been granted for United. If anything, the concessions, record and inferences decisively support IRCA that a majority of the IRCA directors were dominated by United between May 1959 and February 1961, as to prevent IRCA from asserting its antitrust claims against United. Here, at least, as in *Poller, supra* (472-3): "We cannot say on this record that 'it is quite clear [t]hat the truth is' [that demand would have been fruitless]. Certainly, there is no conclusive evidence supporting the respondents' theory."

United failed to meet the standard in *Poller, supra* (468):

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' . . . [for] the purpose of the rule is not to cut litigants off from their right of trial . . . if they really have issues to try."

b. In deciding that it would be *unfair to defendant* to toll the statute for its antitrust violations, the Court of Appeals used the natural consequences of defendant's antitrust wrongs to justify "the unfairness". Contra *Glus* v. *Bklyn. East. Dist. Term., supra,* it gave the defendant "the advantage of [its] own wrongs" and thereby failed to bar an "inequitable reliance on statutes of limitations." Moreover, contra *Burnett* v. *New York Central R. Co., supra,* the decision below undermines "congressional purpose" by refusing to toll the statute where the plaintiff "has been prevented [by the defendant] from asserting" its antitrust claims against the defendant.

The main thrust of the Court of Appeals' holding on unfairness was that "UF has already suffered two judgments [*viz.* the consent decree and the state court judgment in *Ripley*] for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF" (App. 17a). However, the consent judgment, obtained by the United States of America, has never been deemed to bar private enforcement and, in fact, did not remedy the wrong to plaintiff. The *Ripley* judgment in no way compensated IRCA for its damages due to UF's antitrust violations. Indeed, the *Ripley* judgment itself implicitly violated the federal antitrust laws by continuing a dual price structure which discriminated against independent shippers of bananas, and gave a discount to United by reason of its Guatemalan monopoly. That damages are huge and have accrued for three decades is an index of the magnitude of victimization of plaintiff by defendant; that consequence of UF's adverse domination of IRCA, argues for stricter enforcement of the antitrust laws, not immunity. The lower court's concern that there may be "an unexpected loss to many innocent [stockholders] of UF" is misplaced and, in any event, incorrectly premised, as United's stock-

holders have been reaping the benefits of United's antitrust violations against IRCA over the decades plus the use of that money for other investments.

The court below spoke of a huge windfall to IRCA which "might seem rather an overkill" (App. 17a). However, the very purpose of the antitrust laws is to give the victim of antitrust violations a windfall of at least twice its regular damages, in addition to the damage amount, and any "overkill" here results from UF's "*oversteal*", i.e., the cumulative effect of 34 years of wrongdoing. The Court of Appeals has opted for an overkill windfall for the wrongdoer and nothing for the victim—a strange way to enforce the Congressional policy in favor of private enforcement of the antitrust laws!

In its analysis of the "windfall" to IRCA's common stock, the Court below ignored the claims of creditors and the $18,000,000 priority of the preferred stockholders of IRCA.* To excuse the entire antitrust violation because the amounts are huge is to give the wrongdoer the advantage of its own wrong, contrary to *Glus*.

A natural consequence of UF's antitrust torts against IRCA was that IRCA stockholders did not continue to hold their "sour" investment over the three decades (App. 17a-18a; fn. 13); this explains why only an estimated 10% of the current IRCA stockholders owned their stock prior to 1945.** However, the whole point is immaterial because once again the court below points to results which flow from UF's wrongdoing, to support its holding of unfairness to United. Indeed, the "number of stockholders" analysis

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* IRCA has 100,000 shares of $100 par value preferred stock outstanding with a total par value of $10,000,000 and dividend arrears of over $8,000,000 (I-121a).

** The sample used by the court below (App. 17a-18a, fn. 13) is statistically unsound and is another example of the court's piling one false premise on top of another.

ignores IRCA as a corporate entity and erroneously treats this case as a stockholders' suit.

The court below states that "disregard of the statute of limitations might impede efforts by the Government to obtain divestitutes by consent" (App. 17a, fn. 12). But that argument ignores the Congressional mandate to enforce private triple damage actions to *deter* corporations from violating the federal antitrust laws as United did; successful deterrence will eliminate the problem of consent decrees.

The Court of Appeals also stated that United is at a disadvantage because it will not be able to share pro tanto "in any recovery from itself" since it sold its 42% interest in the voting stock, represented by 256,000 shares of common stock in IRCA.* Besides ignoring the claims of creditors and the $18 million claim of the preferred stock in the hands of the public, that holding ignores the benefits that would result from a decision favorable to IRCA, to wit, vindication of plaintiff's rights and the Congressional antimonopoly policy, and the deterrent effect on companies abusing a control position in another company. Moreover, the statement is no weightier than a claim by United that it did not know the law when it sold its IRCA stock.

The court's footnote 12 (App. 17a) about a hypothetical 90% interest in a corporation is far removed from the position of United, and ignores IRCA, the victim. United, the wrongdoer, took its risks and was caught. Now in accordance with the Congressional mandate it should refund its illegal gains, tripled.

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* Mr. Munro, a preferred stockholder, stated at the 1952 IRCA stockholders' annual meeting: ". . . if you take the market appraisal of today of the entire holdings of United Fruit Company, 256,000 shares, you will find that that is less than *one-half of the outstanding arrears* on that preferred stock, and I think it is about time that the preferred stockholders be considered the real equity of this company and not the common" (IV-120a).

c. Domination constitutes an exception to the running of the statute of limitations on federally created causes of action which dissolves only with the ending of the domination. This exception rests on a foundation of policy enunciated by the Supreme Court of the United States in *Glus, supra,* tolling the F.E.L.A. statute of limitations because of an innocent misrepresentation—not so strong a case as the present one of oppressive and wrongful domination preventing the plaintiff's assertion of rights. There the Court held (at 232-3):

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

The same result should follow, *a fortiori,* in antitrust cases. *Minn. Mining & Mfg. Co.* v. *N. J. Wood Finishing Co.,* 381 U. S. 311, 318.*

d. The Court of Appeals, in affirming the denial of plaintiff IRCA's motion for partial summary judgment, ignored

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* In *Kansas City, Missouri* v. *Federal Pacific Electric Co.,* 310 F. 2d 271, 283 (C. A. 8), an antitrust case, the court quoted the above language from *Glus* and held as follows:

> "An examination of the legislative history demonstrates to us that Congress, acting within its authority, intended that the maxim that no man may take advantage of his own wrong should be read into § 4B." [the Federal statute of limitations]

The court stressed the public policy in favor of tolling as to antitrust causes of action:

> "Congress was equally concerned with efficient enforcement of the Clayton Act which certainly cannot be accomplished if [§ 4B] is given a literal construction." (p. 284)

Accord: Westinghouse Elec. Corp. v. *Pacific Gas & Elec. Corp.,* 326 F. 2d 575, 580 (C. A. 9).

White Motor Co. v. *U. S.*, 372 U. S. 253. There, the Supreme Court specified two classes of cases where normally "summary judgments have a place in the anti-trust field"; *viz.*

(1) where "the gist of the case turns on documentary evidence"; or

(2) where there is a "price-fixing" or other "per se" violation (*id.*, 259-60).*

United's exclusion of its competition by fixing the price of transportation and by other predatory practices is demonstrated by the documentary evidence, ignored by the courts below. United failed to submit any refuting evidence. Indeed, under the District Court's Rule 9(g) (App. 31a), it conceded, by failure to contest, plaintiff's statement that "there is no genuine issue to be tried" as to the antitrust claims on which plaintiff seeks summary judgment. (I-180a-183a).

That United's monopolistic exclusion of competition, in the import and export trade of the United States, through control of a railroad bottleneck, violates the antitrust laws is not open to doubt.**

That IRCA was "injured" in its business or property, within the meaning of § 4 of the Clayton Act, by reason of United's antitrust violations, is clear under the authorities. The *direct relations* between United and IRCA pro-

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* The court noted the following as to *per se* violations:

"That category of anti-trust violations is made up of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use'" (*id.*, 262)

** *U. S.* v. *Reading Co.*, 253 U. S. 26, 48; *Swift & Co.* v. *U. S.* 196 U. S. 375; *Standard Oil Co.* v. *U. S.*, 221 U. S. 1; *U. S.* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *U. S.* v. *Swift & Co.*, 276 U. S. 311, 286 U. S. 100.

duced the violations and the resulting injury; that clearly brings it within § 4, both as to the undue restraint and monopolization forbidden in the Sherman and Wilson Acts (15 U.S.C.A. §§ 1, 2, 8) and the acquisitions and uses of IRCA stock forbidden in § 7 of the Clayton Act (15 U.S.C.A. § 18).

Radovich v. *Natl. Football League,* 352 U. S. 445;
Radiant Burners v. *Peoples Gas Light & Coke Co.,* 364 U. S. 656;
Continental Ore Co. v. *Union Carbide Corp.,* 370 U. S. 690, 699-700.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

March 31, 1967.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 178—September Term, 1966.

(Argued November 29, 1966 Decided January 27, 1967.)

Docket No. 30638

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appeal by plaintiff, in an action in the District Court for the Southern District of New York for treble damages under the antitrust laws and other relief, from an order, Sylvester J. Ryan, *Judge,* 254 F. Supp. 233, granting a motion for partial summary judgment by defendant and denying such a motion by plaintiff. Order granting defendant's motion affirmed in part and reversed in part; order denying plaintiff's motion affirmed.

AARON LEWITTES (Leventritt, Bush, Lewittes & Bender, New York, N. Y.) (M. Victor Leventritt, Sidney Bender, Abraham K. Weber, of Counsel), *for Plaintiff-Appellant.*

RALPH M. CARSON (Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y.) (Porter R. Chandler, Robert F. Dobbin, of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge:*

This action was brought on February 16, 1965, by International Railways of Central America (IRCA) against United Fruit Company (UF) in the District Court for the Southern District of New York. The complaint, analyzed in more detail below, asserted six claims, the first four and the sixth seeking treble damages for breach of the antitrust laws, 15 U. S. C. § 15, and the fifth, predicated on the same facts as the third, primarily seeking damages for breach of contract. The asserted damages, going back in some instances to 1928, when trebled were in excess of a half billion dollars.

UF moved for summary judgment (1) dismissing the first, second, fourth and sixth claims and so much of the third and fifth as related to matters occurring before 1961, on the ground that their prosecution was barred by the final judgment awarding damages through December 31, 1960, in a derivative action brought in the New York courts by stockholders of IRCA (hereafter "the *Ripley* action") against that company as a nominal and UF as the real defendant; and (2) dismissing so much of the claims (other than the fifth insofar as it was based on alleged breach of contract) as related to matters occurring before February 16, 1961, as barred by the four-year statute of

limitations for antitrust actions, 15 U. S. C. § 15b. Plaintiff countered with a motion for partial summary judgment as to UF's liability on the first, second, fourth and sixth claims and also as to damages on the second and sixth, mainly on the basis of the record and judgment in the *Ripley* action. Judge Ryan granted both branches of UF's motion and denied plaintiff's, 254 F. Supp. 233 (1966). A judgment was entered which made the recitals appropriate under Rule 54 with respect to the grant of defendant's motion and contained certification under 28 U. S. C. § 1292(b); we granted leave to appeal so that the entire matter might be before us.

I.

A statement, necessarily condensed, of the relations of the parties and of previous litigation is essential to understanding. For the former we draw largely on the findings made by the referee in the *Ripley* action in 1957, which were affirmed by the hierarchy of New York courts.

IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.

In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which

UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock ownership was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S. A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as "special adviser" to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a

profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder.

In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. *Ripley* v. *International Railways of Central America,* 276 App. Div. 1006, 95 N.Y.S. 2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.[1] Although at the trial IRCA had opposed the

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[1] For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retro-

(Footnote continued on following page)

plaintiffs and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, *Ripley* v. *International Railways of Central America*, 8 A. D. 2d 310, 188 N.Y.S. 2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N. Y. 2d 430, 209 N.Y.S. 2d 289 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956-60 in the sum of $3,309,670.39, with interest.

In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree,

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(Footnote continued from preceding page)

actively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15⅓ cent per stem rate which had applied from 1920 to 1930 should be restored from 1943 through 1955. For import traffic he directed an increase of 10% per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that "equity and fair dealing indicate, and no doubt will require, similar annual rateable increases" for the cross-country traffic "until the rates equal those fixed for the general public (or so-called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $4,531,055.38, including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways; the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate and would no longer ship bananas from western Guatemala over IRCA, as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965.

We conclude this history with a summary statement of the six claims in the complaint:

First: loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other banana shippers from using IRCA, 1928-61, $75,000,000.

Second: utilizing IRCA to facilitate UF's monopolistic designs by granting it discriminatorily low rates, 1928-61, $55,000,000 less the principal paid on the state court judgment.

Third: restricting UF's own banana shipments over IRCA, 1949-64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000.

Fourth: monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from west coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher

rail revenues it could have obtained if there had been effective steamship competition, 1928-61, $15,000,000.

Fifth: breach of contract to ship west coast bananas (damages included in third claim).

Sixth: acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U. S. C. § 18 (damages equal to aggregate alleged in first four claims).

The total damages asserted, which may well contain some duplications, amounted to $169,000,000 and, when trebled, to $507,000,000.

II.

We consider first the defense of the four-year statute of limitations for antitrust actions, 15 U. S. C. § 15b, which Judge Ryan sustained save as to the claim for breach of contract. IRCA asserts that the statute did not start to run on any of the antitrust claims until UF relinquished its domination in January, 1962, even though most of the facts had been spread on public records long before, and that the action, brought in February, 1965, was thus timely. UF responds that "domination" as a basis for tolling the statute with respect to an antitrust claim ceases to apply to a corporation once the facts giving rise to the action have become known to independent directors or stockholders since they can bring a derivative action for treble damages on the corporation's behalf, as held in *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 202 F. 2d 731 (2 Cir. 1953). It contends that this condition was here met as to stockholders not later than the annual meeting in March, 1952, when, after a thorough and heated airing of many

of the claims being advanced in *Ripley*, an opposition slate received some 204,000 votes as against 308,000 for the management, and as to directors in 1959 when three "independent" directors were elected to the IRCA board.[2] Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the *Ripley* action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury.

The closest that the Supreme Court has come to dealing with this vexing problem is *Curtis* v. *Connly*, 257 U. S. 260 (1921). This was a suit in equity by the receiver of a national bank against former directors for losses sustained by the payment of dividends out of capital and by improper loans and investments. The suit was brought August 2, 1916, and the six defendants whose liability was at issue had resigned by early 1910. Mr. Justice Holmes considered the suit to have been brought "upon the common-law right of the bank to recover for acts that diminished its assets,"

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[2] The three, Cunningham, Ruckle and Yaeger, were elected May 27, 1959, and remained as directors until 1963. Ruckle, a New Jersey automobile dealer who had owned a substantial amount of IRCA stock since 1954, was invited by McGovern of UF to have his name on the management slate for 1959; so apparently was Cunningham. The record does not show the circumstances as to the nomination and election of Yaeger who had been on the opposition slate at the stockholders' meeting of 1952; however, in view of the absence of cumulative voting, it is inferable that he too was on the "management" slate even though known to be hostile to UF.

257 U. S. at 262,[3] and accordingly treated the case as governed wholly by the Rhode Island statute of limitations without considering possibly more extensive federal principles. The applicable Rhode Island statute was for six years with a proviso that "if any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence." The somewhat anthropomorphic view that "The bank, of course, must be charged with knowledge of what appeared upon its books," 257 U. S. at 262-63, disposed of the claims of concealment of illegal investments and, apparently, also of illegal dividends. The only point further discussed was the carrying of loans on the books at inflated values, as to which the "bank" itself would not perceive the error since the entries tallied with the amount of the loans and the concealment was simply the weakness of the borrower's credit. As to this, notice was found in the election of three new directors between 1909 and early 1910 who came to the board, admittedly with knowledge of the facts, "as the eyes of the bank." 257 U. S. at 264. The Supreme Court's opinion did not discuss, although those in the lower courts had, "the contention made, not with much apparent confidence, that the statute did not begin to run in favor of the retiring directors until the bank passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members . . . ." *Curtis* v. *Connly,* 264 Fed. 650, 652-53

[3] We are not clear why this was so, since the bill apparently alleged acts constituting federal claims under Rev. Stat. § 5239, see the decision of the District Court, *Curtis* v. *Metcalf,* 259 Fed. 961, 963-64 (D.R.I. 1919), and *Chesbrough* v. *Woolworth,* 244 U. S. 72, 78-79 (1917), but we take the opinion as we find it.

(1 Cir. 1920); see also *Curtis* v. *Metcalf*, 259 Fed. 961, 964-66 (D. R. I. 1919). Examination of the briefs in the Supreme Court discloses that the appellant's argument on this score went not to domination as such but rather to knowledge. "Three-fifteenths of a board of directors," it was urged, "is not enough to make their knowledge tantamount to knowledge by the bank." Although the domination issue thus was raised by the facts, the Supreme Court seems not truly to have focused upon it; and while the decision must be taken into account, we do not consider it nearly so conclusive in defendant's favor as did the district judge.

The three precedents in this Court that have been cited to us[4] do not assist decision much further. In *Michelsen* v. *Penney*, 135 F. 2d 409, 415 (2 Cir. 1943), an action by depositors and a receiver of a national bank against directors, we said that "the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers," and found that to be true until the receiver's appointment. But the directors other than Penney were "legally unqualified dummy directors," see 41 F. Supp. 603, 610 (S. D. N. Y. 1941), and it was for that reason that the court, shifting at this point to a theory of concealment, concluded that "notice should not be imputed to the bank, because all these new directors were elected by the controlling Penney group, many of them were lent qualifying shares by this group, and none of them were independent

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[4] We regard *Laird* v. *United Shipyards, Inc.*, 163 F. 2d 12, 15-16 (2 Cir.), cert. denied, 332 U. S. 842 (1947), as without relevance both because of the finding that at the time of the alleged breach of duty "all parties then having any interest in the corporation were fully aware of all the facts," and because the language "Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the group," clearly referred to the New York, not the federal, rule.

in any real sense." 135 F. 2d at 416, n. 2. In *Austrian* v. *Williams*, 103 F. Supp. 64 (S. D. N. Y. 1952), an action by the reorganization trustee of Central States Electric Corporation against directors and others, Judge Weinfeld found that Williams' domination of Central States, as to which see his review of the facts, 103 F. Supp. at 71-75, "was so pervasive that it effectively prevented the proper institution of actions against him and the directors liable with him." *Id.* at 115. Since this sentence was followed by the statement, "The nature and extent of the domination was such as effectively to conceal by its very existence the significant facts of the transactions under attack," it is not clear whether Williams' domination alone would have been considered enough under the circumstances, and this court's view as to the inapplicability of federal principles made it unnecessary to resolve that issue here. *Austrian* v. *Williams*, 198 F. 2d 697, 700-02 (2 Cir.), cert. denied, 344 U. S. 909 (1952).[5] In *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F. 2d 80, 88 (2 Cir.), cert. denied, 368 U. S. 821 (1961), we again recognized "adverse domination" of a corporation as a basis for tolling the statute with respect to a federal claim, and characterized it as "an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress." However, we were not required to mark out the boundaries of the doctrine since we found the complaint "falls far short of" alleging control by the wrongdoers.

While the parties have cited many other federal decisions going in various directions, we see little to be gained

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[5] The opinion distinguished *Michelsen* v. *Penney*, *supra*, as expounding a "federal doctrine," 198 F. 2d at 700, applicable to an action to enforce the liability of a national bank director, compare fn. 3, although the *Michelsen* opinion was by no means clear on that point, see 135 F. 2d at 415, 416, n. 2.

by detailed analysis of them.[6] Many did not have to, or at any rate did not, distinguish between domination *qua* domination, i.e., as affecting the ability to sue, and domination as effecting concealment. None involved control by a single owner, as distinguished from a majority of more or less guilty directors some of whom might decide that their liability in a suit brought by the corporation would be less than their liability for not bringing one. Almost all were actions in behalf of depositors in insolvent national banks. In some ways that point operates in favor of tolling since it seems hard to charge such creditors with the failures of knowledgeable stockholders or the delinquencies of knowledgeable and independent directors; in other ways it operates against it, because in many cases the facts were known by National Bank Examiners, "the real 'eyes of the bank' " and the Comptroller of the Currency could "compel restitution, resignation, or a receivership." *Hughes* v. *Reed,* 46 F. 2d 435, 442 (10 Cir. 1931).

One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." *Payne* v. *Ostrus,* 50 F. 2d 1039, 1042 (8 Cir. 1931). Such control was found, for example, in *Adams* v. *Clarke,* 22 F. 2d 957 (9 Cir. 1927), where all the directors were accused of wrongdoing and held a majority of the capital stock, and also in our *Michelsen* case, *supra.* This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effec-

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[6] A goodly number are cited in an elaborate footnote to the opinion in *Michelsen,* 135 F. 2d at 416 n. 2. However, Judge Clark's law clerk failed him in one respect; the cases, other than *Curtis* v. *Connly,* cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.

tively negate the possibility that an informed stockholder or director could have induced the corporation to sue. And here we think IRCA fails.

While the odds may have been against the likelihood that IRCA's board of directors would have authorized an antitrust action against UF between May 1959 and February 1961, the possibility can by no means be dismissed as negligible. By that time, only four of the old-time directors remained. One of the replacements, Yaeger, would have been highly responsive to a stockholder's demand, see note 2, *supra,* and this also seems likely as to two others, Ruckle and Cunningham.[7] Nor can we simply assume that the other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA directors with whom he was concerned,[8] the very vigor of that then recent expression, its affirmance by the New York courts, the 1958 decree of divestiture in the Government's antitrust suit, and the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request. See Baker & Cary, Corporations, Cases and Materials 470-71 (1959); cf. *Wolf* v. *Barkes,* 348 F. 2d

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[7] Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961, in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation.

[8] "It is difficult to consider with patience the lack of information, inquisitiveness, of prudent care, and of concern of these directors and principal managers of IRCA as testified to by themselves in respect of the very important items of rates and contracts and dealings between their own company, IRCA, and its principal customer-shipper, U. F. Co. These men, it is found, were otherwise as U. F. Co. states it 'upright and honorable men' of high standing and unblemished reputation. * * *"

994, 996 (2 Cir.), cert. denied, 382 U. S. 941 (1965). In this connection, we find considerable significance in the changed position taken by IRCA in the *Ripley* action where in 1958, after the Referee's decision, it urged that the judgment "should be supported and increased," to reflect the full difference between the rates to UF and to independents. While this could be dismissed as cheap insurance for the directors with no real harm to UF since IRCA was merely supporting a position the plaintiff-stockholders were taking anyway, it is equally reasonable to regard it as meaning that the directors, even before the election of the three independents, had come to recognize their duty to protect the corporation once the spectre of loss of the UF contracts had been dissipated. Taking everything into account,[9] we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May 1959 and February 1961 by a stockholder or director would necessarily have been fruitless.[10] UF's control of IRCA thus was no longer "full, complete and exclusive" in the

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[9] The directors also could not have overlooked the risk of dislodgment despite UF's large stock interest. In the 1952 election, five years before the Referee's findings in *Ripley*, the management slate received the votes of only some 51,000 shares other than the 256,000 owned by UF, the independents got some 204,000, and about 89,000 shares, or nearly 15% did not vote. In an election that would have been featured by cries as to the majority's refusal to authorize a multi-million dollar suit against UF arguably called for by the *Ripley* findings and with no risks save the expense of litigation, a considerably larger total vote and an even greater proportion against the UF slate would have been likely. With 95% of the stock voting, UF would have had to retain the suffrage of 29,000 of the independent shares to prevail. Even assembling a respectable management slate would not have been easy under the circumstances.

[10] While this issue is one on which plaintiff might have been entitled to take evidence, it raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point.

sense here relevant.[11] We thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to "domination" of a corporation by the alleged wrongdoer.

In upholding the partial defense of limitations in this case, we are thoroughly mindful that "the treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute," *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358, 365 (9 Cir. 1955), and "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore

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[11] IRCA cites *Delaware & Hudson Co.* v. *Albany & Susquehanna R.R.*, 213 U. S. 435 (1909), which held that shareholders could bring a derivative suit without making the prior demands on management and the shareholders then required by Equity Rule 94 where a majority of the corporation's directors were officers or directors of the corporation alleged to have inflicted the injury and the latter owned 22.9% of the injured corporation's stock. It argues that the question in that case was whether the plaintiffs could reasonably assume that management itself would not bring a suit in the corporation's interests when a majority of the board of directors was controlled by the prospective defendant; that the Supreme Court held in the affirmative; and that the question in this case is the same. Quite apart from the important distinction that only one of IRCA's directors in 1959 was an officer or director of UF, the problems are dissimilar. The basis for barring a derivative suit without prior demand is simply the lack of reason for such an action if the corporation is willing to sue itself, a principle adopted for the benefit of the very corporation that will profit from successful prosecution of the suit. We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception. Although the question asked in the two situations thus may be formally the same, a plaintiff must go further in negating the possibility of suit by the corporation in the situation here *sub judice* since tolling the statute of limitations is far stronger medicine than dispensing with a demand as a condition to the bringing of a derivative action and will impinge upon different interests.

make them more effective." *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 893 (5 Cir. 1954), cert. denied, 348 U. S. 912 (1955). See *United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill.[12] Moreover, the statute of limitations itself embodies a strong policy "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-49 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF.[13]

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[12] Indeed, disregard of the statute of limitations might impede efforts by the Government to obtain divestitures by consent. If UF had retained its stock ownership in IRCA, it would have shared *pro tanto* in any recovery from itself; a controlling stockholder may well be reluctant to sell, at a price reflecting only usual business considerations, if the corporation under new ownership can recover treble damages reaching over decades. And there is surely some anomaly in a doctrine whereby, although there could be no recovery against a former 100% stockholder, and a present 90% stockholder would suffer to the extent of only 10% of the amount recovered in a derivative action, 100% damages without limit of time could be obtained after a 90% stock interest was divested at a price in no way reflecting the claim.

[13] Recovery of the damages sought, without taking account of income taxes, would amount to some $845 for each share of IRCA, and to some $62 per share of UF, currently selling around $31.

(Footnote continued on following page)

Since IRCA has not met its burden of demonstrating that, after the election of the three independent directors in 1959, UF had such "full, complete and exclusive control" as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or director, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the antitrust laws arising prior to Febuary 16, 1961, were barred by limitations.

III.

Our holding on the statute of limitations reduces the importance of the branch of UF's motion based on the rule against splitting a cause of action almost but not entirely to the vanishing point. With all claims prior to February 16, 1961, save so much of the fifth as concerns breach of contract,[14] barred by the four-year statute, the only remaining ones that would be excluded by the splitting rule are the antitrust claims relating to the period between that date and the dissipation of the effects of UF's control consequent on the sale of its stock in Janu-

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(Footnote continued from preceding page)

While the *ad damnum* may be on the optimistic side and income taxes and deductions would cut the amounts roughly in half, the figures remain huge. Yet 68% of the common stock of IRCA is owned by a recent purchaser, and some notion as to how few of the minority stockholders date back to an early period is conveyed by the fact that of the 26 plaintiffs in the *Ripley* action, brought in 1949, only two had acquired their stock before 1945.

[14] Although the District Court's judgment dismissed so much of the third and fifth claims as related to matters occurring before February 16, 1961, "on the ground of *res judicata*," this direction as to the fifth does not accord with the language or theory of the opinion, see 254 F. Supp. at 239.

ary 1962. Moreover, the second claim may have scant practical application to that relatively recent period in view of the provisions for rate increases in the *Ripley* judgment.

Starting from the doctrine that a plaintiff must recover all damages arising from given operative facts in a single action, Restatement, Judgments, § 62, defendant contends that the facts relied on by IRCA for recovery under the antitrust laws in this action are the same as those sued on by its stockholders in *Ripley*. Plaintiff disputes this; it claims that the rule against splitting is inapplicable when the first suit was brought in a forum which lacked power to give the relief sought in the second, thereby distinguishing such cases as *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d 464 (3 Cir. 1950), cert. denied, 341 U. S. 921 (1951), *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F. 2d 362 (5 Cir. 1961), and *Engelhardt* v. *Bell & Howell Co.*, 327 F. 2d 30 (8 Cir. 1964); and it argues that in no event should the rule be applied when a forum without power to give full relief was chosen not by the corporation now plaintiff but by stockholders forced to act in its behalf because of an unwillingness to sue dictated by the defendant, especially when they were ignorant of antitrust violations when the suit was brought.[15]

On the point of fact raised by the argument, the situation seems as follows: The gravamen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action) and the rate divisions on coffee exports and commodity imports; nothing in it can

[15] Plaintiff also argues that when the *Ripley* action was brought in 1949, we had not yet decided *Fanchon & Marco*, *supra*, 202 F. 2d 731, holding that derivative actions for violations of the antitrust laws would lie, but we do not consider that point to have substance.

fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for the damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedly made clear,[16] as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue. See 8 N. Y. 2d at 446, 209 N. Y. S. 2d at 300. The *Ripley* plaintiffs did not seek a judgment for the loss of the traffic of independents. While they did request judgment in excess of $8,000,000 for unfair divisions on export traffic, the Referee declined to grant any, evidently considering that the proof showed only that IRCA had been forced to reduce its own rates to meet truck competition.

To support its position that the action in the New York courts, which lack power to grant relief under the antitrust laws, could not preclude a later federal treble damage suit, plaintiff relies heavily on Judge L. Hand's well-known holding, in *Lyons* v. *Westinghouse Elec. Corp.*, 222 F. 2d 184 (2 Cir.), cert. denied, 350 U. S. 825 (1955), that a state court's overruling of an antitrust defense would not bar a federal suit for treble damages brought by the state court defendant. Defendant distinguishes this, as did the district judge, 254 F. Supp. at 237-38, on the basis that there it was the antitrust defendant, not the antitrust plaintiff, who invoked the state forum. Defendant further asserts that, whatever may be thought of plaintiff's distinction of *Williamson* and the other cases cited above, this cannot explain away our old decision in *Straus* v. *American Publishers' Ass'n*, 201 Fed. 306 (2 Cir. 1912), appeal dismissed, 235 U. S. 716 (1914). Straus had first sued in a New York

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[16] At the instance of counsel for UF, the Referee sustained objections to arguments and evidence which were relevant only to antitrust violations and not to breaches of fiduciary duty.

court under the state and federal antitrust laws for an injunction and damages with respect to an agreement to fix prices of books, and the Court of Appeals had held the agreement valid as to copyrighted although not as to uncopyrighted works. While Straus' appeal to the Supreme Court was pending, he sued in the district court under the federal antitrust act alone. This court held the state judgment conclusive, the opinion saying in one breath that the state court was without jurisdiction of the complaint founded on the federal statute and in the next that the "question was actually involved in the cause before the state court, which was competent to decide it." The Supreme Court later reversed the New York judgment on the merits, 231 U. S. 222 (1913), making a remark equally hard for modern ears to understand: "This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts seeking an injunction and to recover damages under the Sherman Law." 231 U. S. at 237.

The *Straus* case is not directly in point since it held the federal plaintiff barred not by failure to assert a federal claim in the state court but by the state judgment against him upon it. Even as to that, however, Judge L. Hand overruled *Straus* in denying a petition for rehearing in *Lyons, supra;* 222 F. 2d at 195. We think it was well overruled even though, as defendant urges, it perhaps did not need to be in order to support the *Lyons* result.

Since what *Lyons* said in overruling *Straus* would necessarily mean that a judgment in favor of a state court defendant in an action seeking relief under the federal antitrust laws would not bar a subsequent federal suit,[17]

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[17] We do not deal here with a case where the jurisdiction of the state court was challenged and upheld by it, albeit erroneously. See *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *Alleghany Corp.* v. *Kirby*, 340 F. 2d 311, 312 n. 1 (2 Cir.), cert. granted, 381 U. S. 933 (1965), dismissed, 384 U. S. 28 (1966).

it does seem hard to understand how a plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for antitrust relief can have a larger effect. Compare Restatement, Judgments, § 62, Comment on Clause (a), p. 255.[18] We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from that in which the issue was considered by the district judge. "On the whole, the principle against splitting is a salutary doctrine" but "inflexibly applied there can be little doubt that it results at times in unwarranted hardship." 1B Moore, Federal Practice ¶ 0.410[2] at 1169 (2d ed. 1965). It surely was not incumbent on the stockholders who brought the *Ripley* action in 1949 to recover all damages IRCA might sustain until the end of time from acts of UF of the sort there attacked, even those incurred after the period, through 1960, as to which proof of damages was made. Indeed, if the prior judgment had been in a federal treble damage suit by the corporation, it would not preclude recovery for subsequent antitrust violations. *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322 (1955). The complaint should therefore not have been dismissed as to claims within the appropriate period of limitations

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[18] Section 62k of the Restatement suggests that where the plaintiff sues in a court whose sovereign cannot or has not made available a court which can afford the plaintiff relief for his entire cause of action, there is no bar to a subsequent suit on the unredressed portion of that cause of action in the court of another sovereign which does afford such relief. This seems much closer to the case at bar than the rule of § 62j, relied on by the district judge, 254 F. Supp. at 238, which deals with a prior suit brought in a court of limited jurisdiction where the sovereign has made available another court with jurisdiction to grant all the relief sought.

IV.

Plaintiff's appeal from the denial of its motion for partial summary judgment is without merit. Since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws, the judgment cannot have adjudicated that UF violated them; on this point the overruling of *Straus, supra,* 201 Fed. 306, by *Lyons, supra,* 222 F. 2d 184, works for the defendant. The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that. See Restatement, Judgments, §§ 68 and 71, and *Lyons, supra,* 222 F. 2d at 195-96. With this action limited to damages after February 16, 1961, save on the contract claim which plaintiff does not contend to have been considered in *Ripley,* the role of the findings and judgment in the prior action is even more limited.

The judgment is affirmed insofar as it barred claims for damages under the antitrust laws accruing before February 16, 1961, is reversed insofar as it went beyond this, and is affirmed insofar as it denied plaintiff's motion for partial summary judgment. No costs.

APPENDIX B

Judgment of Court of Appeals, Dated and Entered January 27, 1967.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and sixty-seven.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals, Dated and Entered January 27, 1967.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court denying plaintiff's motion for partial summary judgment be and it hereby is affirmed.

It is further ordered, adjudged and decreed, that the order granting defendant's motion be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Statutes.

15 U.S.C. § 1, provides in pertinent part, as follows:

"TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL . . . PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 2:

"MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 8:

"TRUSTS IN RESTRAINT OF IMPORT TRADE ILLEGAL; PENALTY

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy,

illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

15 U.S.C. § 15:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statutes.

15 U.S.C. § 15b:

"LIMITATION OF ACTIONS

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

15 U.S.C. § 18 (1946 ed.) prior to its amendment in 1950, provided in pertinent part, as follows:

"ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using

the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything hereto-

fore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided. . . ."

28 U.S.C. § 1738:

"STATE AND TERRITORIAL STATUTES AND JUDICIAL PROCEEDINGS; FULL FAITH AND CREDIT

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

APPENDIX D

Rule 9 (g) of the General Rules of United States District Court for the Southern District of New York.

9. (g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

APPENDIX E

Excerpt From United's Brief in United States Court of Appeals (October 24, 1966).

"We may concede for present purposes (as *Ripley* determined) that United dominated Railways to such an extent as to become accountable to Railways on a fiduciary basis. We may even concede for present purposes that the degree of 'domination' found in *Ripley* may have been sufficient to prevent Railways from bringing an action in its own name, as the Appellate Division pointed out in the quotation at appellant's br. 45-6.*

* "It is equally obvious here that demand upon the directors of IRCA to sue UFCo, in connection with the acts and transactions complained of in the instant action, would have been a useless and futile act. (*Sage* v. *Culver,* 147 N. Y. 241, 246; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435, 451.) No fair and honest consideration of such a demand could have been anticipated under the circumstances; nor could there be *any reasonable expectation of any just and vigorous prosecution of a suit. The IRCA board was under the influence of UFCo with respect to the causes of action which could be asserted against UFCo.* . .

* "Where an antagonistic position is demonstrated, stockholders have the right to remove the matter from the hands of management and bring an action in a representative capacity. (*Chaplin* v. *Selznick,* 186 Misc. 66, 68.) Since futility of demand was shown by the evidence establishing interest or bias on the part of the directors, plaintiffs were entitled to proceed with the action. *Surely, we would not compel them to entrust the prosecution of such an action in the hands of persons who would be opposed to the success of the suit.*" (Italics supplied)

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* Quotation from Appellant's Brief, pp. 45-6.

APPENDIX F

Excerpt From United's Reply Brief on Its Motion for Summary Judgment in the United States District Court (June 23, 1965).

"If we adopt the rule that the presence of one or more independent minority directors is sufficient to stop the tolling of the statute, the undisputed fact (as demonstrated by the Railways' corporate records and the supplemental Carson affidavit sworn to June 18, 1965) is that from at least 1959 onwards there were not one but three independent directors of the Railways: George A. Ruckle, James B. Cunningham and Louis Yaeger, whose interests and activities were directly antagonistic to United Fruit . . ."